UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

McDONALD'S USA, LLC, A JOINT EMPLOYER, et al. Employer, and FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al. Petitioner.	Case 02-CA-093893

MOTION FOR PERMISSION TO FILE A BRIEF AS *AMICUS CURIAE* and BRIEF OF *AMICUS CURIAE* HR POLICY ASSOCIATION IN SUPPORT OF THE EMPLOYER'S POSITION IN THE INSTANT SPECIAL APPEAL

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REQUEST TO FILE AND STATEMENT OF INTEREST

HR Policy Association respectfully requests permission from the National Labor Relations Board's ("NLRB" or "Board") to file the following brief as *amicus curiae* for the reasons set forth below.

The HR Policy Association ("HRPA" or "Association") is a public policy advocacy organization representing the chief human resource officers of major employers. HRPA consists of more than 375 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive.

Association members regularly have matters before the NLRB and have closely followed the continuing debate and discussion about the state of the law regarding joint employer status under the National Labor Relations Act ("NLRA" or "Act"). Indeed, this subject has generated considerable discussions and questions from Association members. The lack of clarity of the law in this area is especially damaging to Association members' business planning, including in the franchisor/franchisee area. For example, Association members are desirous of providing safety and other training to employees of franchisees, employees of the supply chain entities, and other contractors with whom they do business, but do not want to be brought into costly and protracted legal proceedings on joint employer theories as a result of such beneficial and needed training. Recently, the Association described this very situation in an amicus brief it filed in the *Browning-*

Ferris case presently pending in the U.S. Court of Appeals for the D.C. Circuit.[1] In the situation described in such amicus brief, an Association member had established a minimum number of paid leave days it desired that its contractors provide to their employees. On that basis alone, the Association member was brought into an NLRB unfair labor practice proceeding on a joint employer theory. Such concern from Association members has been heightened by the desire to provide enhanced training in the hostile work environment area in light of the #MeToo movement. These types of corporate social responsibility initiatives such as minimum level of benefits for employees of supply chain entities, franchisees, and other contractors should not continue to create joint employer status uncertainty. The Board should expeditiously address this question, not only in the pending special appeal, but also through its recently initiated rulemaking exercise.

Finally, the instant brief discusses two issues that the Association does not believe have been addressed by the parties in this pending special appeal: first, the inappropriate weaponization of ethics rules and procedures in NLRB decision-making, and second, the application of the long-established rule of necessity doctrine to the instant matter.

SUMMARY OF ARGUMENT

The briefs filed by McDonald's USA, LLC ("McDonald's") and the Coalition for Democratic Workplace, in opposition to Service Employees International Union's ("SEIU") motion to recuse NLRB Chairman John Ring and NLRB Member William Emanuel, correctly

[1] Amici Curiae Brief of Microsoft Corporation and HR Policy Association in Support of Petitioner/Cross-Respondent, *Browning-Ferris Indus. of Cal. v. NLRB*, 2017 U.S. App. LEXIS 26985.

and comprehensively articulate the factual and legal deficiencies of such a motion and the HR Policy Association fully endorses them.

Further, the precedent that is available on the appearance of conflict issue advanced by SEIU is directly opposite of SEIU's position, including recusal refusals in similar appearance of conflict of interest cases involving former NLRB Members Craig Becker and Kent Hirozawa.

Additionally, the attempts by certain parties to weaponize ethics standards is not only inappropriate but will result in long-term institutional harm to the integrity of the Board. Such initiatives have also inappropriately attempted to involve the Board's Inspector General and the Board's Designated Agency Ethics Officer.

It is clear that SEIU's recusal motion is designed to attempt to either prevent or substantially delay the Board from deciding the instant special appeal. Even assuming *arguendo,* however, that SEIU's motion for recusal has limited merit, the rule of necessity doctrine clearly permits the Board to expeditiously proceed to grant such appeal and approve the settlement of this litigation reached between McDonald's and the Board's General Counsel. For example, even if both Chairman Ring and Member Emanuel were recused, or only one of them was recused from participating in this matter, and, therefore, a deadlock resulted initially preventing the Board from making a decision, the rule of necessity doctrine would override any such deadlock and permit the Board to decide the case.[2]

[2] The Board at present has four members: Chairman Ring, Member Emanuel, Member Lauren McFerran and Member Marvin Kaplan. Removal of Chairman Ring and Member Emanuel. Pursuant to the Supreme Court's decision in *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the rule of necessity doctrine would permit the Board to proceed to decide the pending appeal even if a 1-to-1 Board deadlock occurred in a three-member panel delegation situation. *See Argument at II-C of the Instant Brief.*

The underlying issues of the special appeal have been exhaustively litigated dating back seven years, including more than 140 days of hearings in the main proceedings alone. No further delay should occur. Weaponization of ethics rules should immediately cease. The Board's Inspector General and Designated Agency Ethics Officer should only be involved in recusal situations in a neutral advisory capacity. The Board should reject SEIU's recusal motion as it is without factual or legal merit. If SEIU's motion for recusal were to succeed however, pursuant to the rule of necessity doctrine, the Board is authorized to render a decision on the special appeal and should do so expeditiously.

ARGUMENT

I. SEIU's Motion Seeking Recusal of NLRB Chairman John Ring and NLRB Member William Emanuel is Without Factual and Legal Support and is an Inappropriate Attempt to Weaponize Ethics Rules

Executive Order 13770 and 5 C.F.R. §2635.502 have been cited by SEIU as the sources of authority requiring NLRB Chairman John Ring and NLRB Member William Emanuel to recuse themselves in the instant matter. Executive Order 13770, however, only applies in situations where individuals holding certain government positions are required to recuse themselves and not participate in matters "directly and substantially related" to their "former clients" or their "former employers."[3] Such individuals are, as a general rule, precluded for a period of two (2) years from participating in matters in which their "former employer or former client is a party or represents a party." The term "former client" is restricted to situations where a government official personally represented a client within the applicable two-year time frame.

[3] Exec. Order No. 13770, 82 F.Reg 9333§1(6) (2017).

The term "former employer" is restricted to "any person for whom the appointee has within the two years prior to the date of his or her appointment served as…general partner."

The above-outlined authority clearly does not require Chairman Ring or Member Emanuel to recuse themselves from participating in the instant special appeal. Indeed, SEIU concedes, as it must, that neither Chairman Ring's nor Member Emanuel's former firms, Morgan Lewis and Littler Mendelson, have ever been parties to the instant litigation. Further, neither Morgan Lewis nor Littler Mendelson ever filed any pleadings or briefs, appeared in the case, or participated in any argument in the case. Finally, SEIU also concedes that neither Chairman Ring nor Member Emanuel ever personally participated in the instant matter prior to being confirmed for their present positions.

SEIU further admits that its instant recusal motion "presents a unique situation."[4] While its motion may be "unique," the only "spin" that SEIU attempts to place on its motion is that Morgan Lewis and Littler Mendelson allegedly provided certain counseling assistance to McDonald's franchisees regarding labor matters. SEIU presents no evidence, however, as to the extent of such representation. The only argument that it can present is that certain McDonald's franchisees were provided an opportunity to ask questions of the above law firms regarding potential initiatives to interfere with their businesses, including SEIU's *Fight for $15* movement and related activities. SEIU cannot show any connection between such alleged representation and the pending special appeal.

SEIU's legal arguments are equally spurious. At the outset, there should be no question regarding Member Emanuel's ability to participate in the consideration of the special appeal. As

[4] *See* Charging Parties' Motion for Recusal of Chairman Ring and Member Emanuel at 7, *McDonald's USA, LLC, et al.*, Case Nos. 02-CA-093893, *et al.* (2018).

outlined in the McDonald's brief opposing SEIU's recusal motion, Member Emanuel participated without any opposition in a prior aspect of this case. Specifically, on October 9, 2017, McDonald's filed a special appeal of the administrative law judge's order regarding a requirement that the company provide then NLRB General Counsel Richard Griffin with an expert report. SEIU opposed such special appeal, in part, but did not in any fashion whatsoever seek to recuse Member Emanuel. Member Emanuel participated in the Board's decision to reverse the administrative law judge's ruling on this point.[5] Indeed, Member Emanuel not only participated in such special appeal without objection from SEIU, but he ruled, in part, against McDonald's – certainly not an indication of bias for the Company in this litigation. The law is clear that SEIU had an obligation to raise its recusal argument at the time the Board considered this special appeal. It failed to do so. As noted in the McDonald's memorandum filed in opposition to SEIU's recusal motion, "a party that becomes aware of purported grounds for a Member's recusal must act promptly, and it may not wait to raise the issue only after the Member has participated in the case."[6]

Further, SEIU furnishes no legal support or precedent that requires Chairman Ring and Member Emanuel to recuse themselves. Their sole argument centers around an alleged appearance of a conflict of interest. SEIU, however, has not furnished any Office of Government Ethics opinion or case law decision that supports such an argument. Indeed, the precedent that does exist in this area is contrary to SEIU's position. For example, under the Obama

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[5] See *McDonald's USA, LLC*, Case No. 02-CA-093893, Order at *2 (N.L.R.B. Jan. 16, 2018) (unanimous panel decision that "the judge abused her discretion in requiring an unwarranted discovery procedure").

[6] McDonald's USA, LLC's Opposition to Charging Parties' Motion to Recuse Chairman Ring and Member Emanuel, *McDonald's USA, LLC,* Case Nos. 02-CA-093893, *et al.* (2018); See, *e.g. Somerset Valley*, Case No. 22-RC-13139, Order at *3 (N.L.R.B. Nov. 16, 2011).

administration, the Office of Government Ethics provided guidance specifically stating that "a former client does not include a client of the appointee's former employer to who the appointee did not personally provide services."[7] Furthermore, "although an appointee's former law firm provided legal services to corporation, the corporation is not a former client of the appointee for purposes of the [Ethics Pledge] if the appointee did not personally render legal services to the corporation." This legal advisory remains valid in application to the current Executive Order 13770 under the Trump administration[8], and is of particular relevance to the current matter as SEIU, as noted above, has made no allegations that Chairman Ring or Member Emanuel have personally rendered legal services to McDonald's or any other party involved in the current matter.

Further, the appearance of conflict issue was specifically raised in a series of challenges to former NLRB Member Craig Becker's participation in cases involving SEIU entities. Former Member Becker had served as a counsel to the SEIU International Union prior to being recess appointed to the Board. A number of arguments were raised that sought to recuse him from participating in cases involving SEIU local unions. Such recusal requests were based, in large part, on the fact that the SEIU International Union could exercise considerable control over their locals, pursuant to the International's Constitution and By-laws. Accordingly, there was, at a minimum, an appearance of conflict if former Member Becker participated in cases involving SEIU locals. Former Member Becker refused to recuse himself from such cases stating that while the SEIU International Union and its locals may have technically been the same entities,

[7] ROBERT I. CUSICK, OFFICE OF GOVERNMENT ETHICS, DO-09-020, ETHICS PLEDGE ISSUES: SPEECHES AND PLEDGE PARAGRAPH 2; INTERGOVERNMENTAL PERSONNEL ACT DETAILEES (2009).
[8] DAVID J. APOL, OFFICE OF GOVERNMENT ETHICS, LA-17-03, GUIDANCE ON EXECUTIVE ORDER 13770 (2017).

they were separate enough for him to participate. This assertion was directly contradicted in the letter by the National Right to Work Legal Defense Foundation, which stated that "…by explicit SEIU constitutional provision and in practice, SEIU exerts near total control over and is financially tied to its locals."[9] Notwithstanding such clear appearance of conflict of interest, former Member Becker continued to participate in multiple cases involving SEIU locals.

Further, former NLRB Member Kent Hirozawa was also faced with appearance of conflict arguments during his tenure on the Board but refused to recuse himself in response to such challenges. In *McKenzie-Willamette Reg'l Med. Cetr.*, a Board case decided in 2014, appearance of conflict argument was directed at former Member Hirozawa. Such arguments were based, in large part, on his participation in a previous matter in which he was retained as legal counsel for the Communications Workers of America. In such case, former Member Hirozawa was defending against a lawsuit brought by an attorney representing a specific party to the NLRB case before him.[10] Member Hirozawa denied the motion for his recusal, concluding that "no reasonable person would conclude that my participation in this case violated ethical guidelines," and noting that the previous matter had occurred nearly two decades prior.[11] Member Hirozawa again faced a motion for recusal in *New Vista Nursing*, a Board case that eventually went before the Third Circuit on appeal. The recusal motion was based on the fact that Member Hirozawa had been previously employed by a law firm that had served as counsel for the union (SEIU) in the instant matter.[12] Member Hirozawa refused to recuse himself on the

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[9] Raymond J. LaJeunesse, *Does the NLRB's Inspector General Have a Double Standard for When Board Members Must Recuse?*, THE FEDERALIST SOC'Y Feb. 22, 2018, https://fedsoc.org/commentary/blog-posts/does-the-nlrb-s-inspector-general-have-a-double-standard-for-when-board-members-must-recuse.
[10] *McKenzie-Willamette Reg'l. Med. Ctr.*, 361 N.L.R.B. 54, 56-57 (2014**).**
[11] *Id*.
[12] *NLRB v. New Vista Nursing and Rehabilitation*, 870 F.3d 113, 124-25 (3rd Cir. 2017).

grounds that "he had not personally" provided legal services to the union or represented the union in the instant matter while employed by his former firm. The Third Circuit subsequently affirmed former Member Hirozawa's decision and held that he had not abused his discretion by choosing not to recuse himself.[13] Specifically, the Third Circuit noted that "it was not unreasonable for Member Hirozawa to conclude that he did not need to recuse himself because he had not personally represented the Union in this matter…"[14] This case is directly analogous to the present matter. Indeed, similar to the arguments made regarding Member Hirozawa, there have been no allegations that Chairman Ring or Member Emanuel personally provided legal services to any party to this case, only that their respective previous employers had provided limited legal assistance in the past to McDonald's franchisees on unrelated matters. Similar to the cases involving former Members Becker and Hirozawa, neither Chairman Ring nor Member Emanuel is required to be recused from this case.[15]

Accordingly, to the extent there is any precedent in the appearance of conflict area, it is directly opposite of SEIU's position.

A. Ethics Requirements Should not be Weaponized to Prevent the National Labor Relations Board Members from Deciding Cases

[13] *Id.* at 125.
[14] *Id*.
[15] The Third Circuit dealt with Board recusal issues most recently in 2016 in *1621 Route 22 West Operating Co. v. NLRB,* affirming a decision that Board Chairman Mark Pearce was not required to recuse himself in an appearance of conflict issue matter involving his Chief Counsel Ellen Dichner. *1621 Route 22 West Operating Co. v. NLRB*, 825 F.3d. 128,143 (3d Cir. 2016). Even though Dichner had previously represented the union involved in the matter before an administrative law judge, the Court found that there was no appearance of conflict because Dichner had not participated in the Board's consideration of the case, and that "there [was] no evidence that Dichner played any role in the consideration of the case" before the Board. *Id.* at 144.

The unprecedented weaponization of ethics policies and related recusal requests began last year during the Board's consideration of the *Hy-Brand* case.[16] Unfortunately, such efforts have not abated and continue to the instant case. These misguided recusal initiatives are designed to prevent certain Board members to participate in important policy cases and to advance short-term goals of certain parties.[17] Such recusal motions have not been grounded on legitimate beliefs that Chairman Ring and Member Emanuel have actual conflicts of interest as defined by Executive Order 13370 or the Standards of Ethical Conduct for Employees of the Executive Branch. Instead, such initiatives clearly are efforts by certain parties to recuse Board members based solely and entirely on members' past professional affiliations, regardless of whether the members have had any prior personal involvement with the parties or in the case at issue.[18] This is not what the law regarding conflicts of interest requires or intends.

Efforts to recuse Board members who have no actual conflicts of interest impede the Board's ability to adjudicate. Congress created the Board as an adjudicative body[19], so that the Board is able to render decisions without deadlock. If the instant efforts to recuse Board members succeed, the Board may be rendered ineffectual – unable to render decisions due to constant deadlocks and insufficient legal quorums. This is not what Congress intended.

The weaponization initiatives also have unfortunately and inappropriately involved the Board's Inspector General and its Designated Agency Ethics Officer. Individuals in such

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[16] *Hy-Brand Indust.*, 366 NLRB No. 26 (2018).
[17] *See, e.g., McDonald's USA, LLC, et al.*, Case Nos. 02-CA-093893, *et al.* (2018) (union seeking recusal of Chairman Ring and Member Emanuel); *The Boeing Company*, 366 NLRB No. 128 (2017) (union seeking recusal of Chairman Ring and Members Emanuel and Kaplan).
[18] *See, e.g., The Boeing Company*, 366 NLRB No. 128, at *1 n. 1 (2018) (denying union's motion "requesting that Chairman Ring and Members Emanuel and Kaplan 'immediately cease deciding any Board cases including this case'" due to Members' "complete bias in favor of employers and against unions").
[19] *See* 29 U.S.C. § 153(a).

positions have been increasingly involved in what cases Board members can participate. Such involvement is wholly inappropriate as they are to be neutral agency officials. Further, they are not presidentially nominated nor confirmed by the Senate and, therefore, should only have a neutral/advisory role in any recusal situation. Further, their involvement in any recusal matter should be immune from political influence from members of Congress. Recusal decisions are to be made by individual Board members.

Finally, the Board exists to serve all those who come before it based solely on the facts presented and the applicable law. Parties should litigate the merits of their cases, rather than attempting to reconfigure the Board membership based on political calculus. Similarly, the Board should be permitted to function as Congress intended – as an adjudicative body with members appointed by different administrations. Board members should not be subjected to recusal motions based on predictions as to how they might rule in a particular matter.

II. Even if SEIU's Uninformed Motion for Recusal Had Plausible Merit, Under the Rule of Necessity Doctrine, the Board Should Proceed to Decide the Pending Special Appeal

A. The Issues Presented by the Special Appeal Have Been Exhaustively Litigated for Years and Further Delay in Deciding such Special Appeal is not Warranted

The Board proceedings against McDonald's dates back nearly four years, with the original allegations dating back all the way to 2012. Since former NLRB General Counsel Richard Griffin's central case against McDonald's began in March 2016, the proceedings "have generated 142 hearing days, 123 witnesses, 3,035 admitted exhibits, and 21,190 transcript pages."[20] After years of back and forth, McDonald's and the Board's General Counsel reached a

[20] McDonald's Opposition to Charging Parties' Motion to Recuse Chairman Ring and Member Emanuel at 5, *McDonald's USA, LLC, et al.,* Case Nos. 02-CA-093893, *et al.* (2018).

settlement this past March, only to be set back further by an erroneous ALJ decision to reject the settlement four months later in July. The Board has compounded this mistake by unnecessarily withholding action on the special appeal in the months since the ALJ decision. Such a delay is arguably a violation of the Administrative Procedure Act ("APA") and the Board's duty to resolve matters expeditiously.[21] The settlement reached provided complete relief on the substantive allegations in this case. Unsupported and spurious conflicts of interest arguments should not prevent the Board from rendering a decision on the special appeal.

B. The Rule of Necessity Doctrine Overrides Spurious Conflicts of Interest and Recusal Issues

The rule of necessity provides that a judge or administrative official has a duty to decide a case, even when there is a potential conflict of interest, if the matter could not otherwise be heard.[22] This doctrine dates back "at least five and a half centuries ago," and is based on "an

[21] Federal agencies are bound by the Administrative Procedure Act to resolve matters in a reasonably expeditious and efficient manner. Specifically, the Act holds that "with due regard for the convenience and necessity of the parties…each agency shall proceed to conclude a matter when presented to it." U.S.C. §555 (b). The Act empowers courts to compel agency action "unlawfully or unreasonably delayed," and thus a failure to act is subject to judicial review and court compulsion of agency action. *See* U.S.C. § 551 (13), 706 (1). The duty to resolve matters without unreasonable delay has been recognized by the Supreme Court and is an integral part of the administrative process. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). Indeed, multiple courts of appeals have implicated the Board for failing to act in a timely and reasonable manner in violation of the APA. *See, e.g.*, *TNS Inc. v. NLRB.*, 296 F.3d 384, 404 (6th Cir. 2002) (vacating Board decision); *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2d Cir. 1991). Administrative delay before the Board has been considered "deplorable" and "corrosive," and generally, "remedies for unfair labor practices 'must be speedy in order to be effective.'" *Emhart Indus. v. NLRB*, 907 F.2d 372, 378-79 (2d Cir. 1990). Thus, the Board is compelled, both by the law of the APA and the Congressional intent for administrative swiftness it evinces, and by court precedent interpreting such law, to resolve proceedings as expeditiously as reasonably possible.

[22] *See, e.g., U.S. v. Will*, 449 U.S. 200 (1980) ("although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise")

absolute duty of judges to hear and decide cases within their jurisdiction."[23] The Supreme Court laid out the modern foundation of the rule in *U.S. v. Will*, a case in which thirteen federal district court judges brought suit challenging statutes limiting their compensation.[24] The Court held that because all Article III judges had an obvious interest in the case, the rule of necessity prevailed over the disqualification standards of §455[25] and recusal was not necessary.[26] The Supreme Court's decision in *U.S. v. Will* thus formally articulated the long-standing rule that "allows a judge, normally disqualified, to hear a case when 'the case cannot be heard otherwise.'"[27] The rule of necessity "has been consistently applied in [in the United States] in both state and federal courts" in service of the vital interest of providing litigants with a right to a forum, and a timely decision.[28]

This rule applies to agency administrative proceedings as well,[29] and has application specifically where recusal of a decision maker (such as a member of the Board) would result in an inability to render a decision due to lack of a quorum.[30] Furthermore, the rule applies in situations where an administrative tribunal could not act in event of a recusal due to a deadlock

[23] *Id*. at 213-14.
[24] *Id*. at 203-4.
[25] Statute governing recusal requirements for Article III judges.
[26] *Id.* at 212.
[27] *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160, 1165 (9th Cir. 2006) (quoting *U.S. v. Will*, 449 U.S. at 213).
[28] *U.S. v. Will*, 449 U.S. 200, 216-17 (1980).
[29] *FTC v. Cement Institute*, 333 U.S. 683 (1948).
[30] *See, e.g.* Office of Gov't Ethics Informal Advisory Letter 83 X 18 (Nov. 16, 1983) ("[T]he rule of necessity operates to authorize, or perhaps to require, participation where recusal would otherwise be mandated" if an agency member's "participation is essential for the presence of a quorum, or because no other decision maker available."; *see also* in re Riad et. al, SEC Release No. 4420, at 36 n. 107 (June 13, 2016) (rule applicable where "disqualification [would] eliminate the means to resolution"); in re First Jersey Sec., Inc., SEC Release No. 261 (Nov. 14, 1984).

among remaining members.[31] The rule has been invoked in administrative proceedings in cases of financial interest[32], political interest[33], personal bias generally[34], and family interest[35]; there is virtually no conflict of interest scenario that does not have precedent where the rule of necessity has been invoked to bring about a decision. Where an adjudicative body would be unable to render a decision because of the recusal of one of its members, the rule of necessity applies and provides for the matter to proceed without recusal.

C. The Rule of Necessity Doctrine Authorizes the Board to Decide the Special Appeal

As outlined above, pursuant to the long-established rule of necessity doctrine, if a tribunal for whatever reason is initially precluded from rendering a decision, such impediment(s) can be overridden, and the tribunal can proceed to decide the matter before it. This doctrine is particularly applicable here.[36]

For undisclosed reasons, the Board has yet to rule on the instant special appeal which has been pending since July 2018. Assuming for discussion purposes that the Board is delaying a decision on the pending special appeal due to issues associated with SEIU's recusal motion – which HR Policy submits is uninformed and without legal or factual support – concerns regarding the recusal motion can be overcome by application of the rule of necessity doctrine.

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[31] *See, e.g. Stonecipher v. Poplar Bluff R1 School Dist*., 28 A.L.R.6th 703 (Mo. Ct. App. S.D. 2006); *Barker v. Sec'y of State's Office*, 752 S.W.2d 437, 441 (Mo. Ct. App. 1988).
[32] *See, e.g., Affordable Housing Alliance v. Feinstein*, 179 Cal. App. 3d 484 (D. Cal. 1986).
[33] *See, e.g. Price v. Fitzpatrick*, 100 S.E. 872 (W.Va. 1919).
[34] *See, e.g., Federal Home Loan Bank Bd. v. Long Beach Federal Sav. And Loan Ass'n* 295 F.2d 403 (9th Cir. 1961).
[35] *See, e.g., Mank v. Board of Fire and Police Com'rs*, 288 N.E.2d 49 (D. Ill. 1972).
[36] *See, e.g. Stonecipher v. Poplar Bluff R1 School Dist*., 28 A.L.R.6th 703 (Mo. Ct. App. S.D. 2006); *Barker v. Sec'y of State's Office*, 752 S.W.2d 437, 441 (Mo. Ct. App. 1988).

For discussion purposes, there are potential outcomes where the present four-member Board could be deadlocked on a 1-to-1 basis if any arguable merit could be established in the pending recusal motion. For example, the pending matter could be before a three-member Board panel, which is the normal procedure for the Board to decide cases. In such situation, if either Chairman Ring or Member Emanuel were recused from a three-member panel consideration of the case, only two members would be left to decide the case. Under the Supreme Court's decision in *New Process Steel*[37], the Board could proceed to make a decision with only two members.[38] If both members in such two-member voting situation agreed on a position, the case would be decided. Alternatively, if the remaining two members disagreed, a 1-to-1 deadlock would occur. Further, if both Chairman Ring and Member Emanuel were recused from a designated three-member panel, only one member would remain, and the case could not be decided.[39] Under these situations, the rule of necessity doctrine would permit the recused Board member to participate.

Finally, if the pending special appeal has not been delegated to a three-member panel, legal quorum issues may also prevent the Board from initially deciding this case. For example, if Chairman Ring and Member Emanuel were both recused from a full, four-member Board consideration of this case under *New Process Steel*, the remaining two members would not constitute a legal quorum and the case could not be initially decided. Here, again, under the rule

[37] *New Process Steel v. NLRB*, 560 U.S. 674 (2010).
[38] *Id.* at 679.
[39] Amicus acknowledges the longstanding Board practice permitting any Board member to participate in the adjudication of any case. A Board member who was not initially assigned to a three-member panel could voluntarily join such panel after it has been designated. In such situation, a close reading of *New Process Steel* may not permit a panel that has been reduced to one member due to recusal motions to reestablish a two-member legal quorum. Even if a quorum could be reestablished in such situation, the potential for a 1-to-1 deadlock would still be present.

of necessity doctrine, the Board would be permitted to proceed to decide the case with one or both initially recused members participating.

The rule of necessity therefore readily applies to the present proceeding and renders any questions of recusal moot. A failure to move forward with the special appeal pending the outcome of the recusal motion would not only constitute unreasonable delay, but also arguably violate the APA. Indeed, "the appearance of justice suffers far greater damage from a court's unnecessary inability to reach a decision than it does from the participation of a member of the court for whom there are palpable but far-fetched possibilities of bias."[40] The Board has a legally enforceable duty to resolve the matter and render a decision on the special appeal. Further, as noted above, there is absolutely no factual support for SEIU's recusal motion, and the available legal precedent applicable to this matter is also adverse to SEIU's position. Stated alternatively, SEIU's "appearance of a conflict" argument is at best a purely subjective and spurious interpretation of government ethics standards and is a clear attempt to prevent the Board from having a legal quorum to decide the special appeal. This situation is exactly the type of case where the rule of necessity doctrine is applicable. Accordingly, the Board should deny SEIU's motion, grant the special appeal, and expeditiously render a decision on the proposed settlement.

III. The Settlement Reached Between McDonald's USA and the Board's General Counsel Should be Approved

[40] *U.S. v. Mandel*, 609 F.2d 1076, 1077 (4th Cir. 1979 (Murnaghan, J., writing separately).

For the reasons stated in both the McDonald's brief and the brief of the Board's General Counsel's in this matter, the special appeal should be granted, and the settlement reached between the Board's General Counsel and McDonald's should be approved.

CONCLUSION

For the foregoing reasons, the Board should avoid any further delay in this matter, grant the special appeal, and expeditiously approve the settlement reached in this matter between McDonald's USA and the Board's General Counsel.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on November 30, 2018, I delivered a true copy of the foregoing revised Request to File an Amicus Brief and a copy of Amicus Brief to be electronically filed using the National Labor Relation Board's Internet website upon counsel for the parties by email at the following addresses designated for this purpose:

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